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Yap Teck Ngian v Yap Hong Lang @ Yap Fong Mei & Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO C–02–1039 OF 2001

B

ABDUL AZIZ MOHAMAD, JAMES FOONG AND ZULKEFLI JJCA

27 SEPTEMBER 2006

C

Civil Procedure — Administration of estates — Letters of administration — Revocation of grant, application for — Whether ought to be commenced with issue of citation — Whether prior entry of caveat necessary — Rules of the High Court 1980 O 71, O 72

D

Civil Procedure — Administration of estates — Letters of administration — Revocation of grant, application for — Application for issue of citation — Whether court ought to consider merits of application for revocation of grant when considering whether to issue citation — Merits, when considered

E

Civil Procedure — Administration of estates — Letters of administration — Revocation of grant, application for — Citation, issuance of — Verifying affidavit, contents of — Whether verifying affidavit ought to contain grounds upon which plaintiff intends to sue for the revocation of the letters of administration

F

Succession — Letters of administration — Revocation of grant — Application for citation — Proper procedure — Whether ought to have been commenced by way of summons — Whether sufficient to proceed by way of praecipe supported by verifying affidavit — Whether praecipe and verifying affidavit ought to be served upon citee — Whether application for citation ought to be heard ex parte — Rules of the High Court 1980 O 72 rr 7, 8, 18

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H

The appellant was the administrator of the estate of YHK, deceased. The respondents claimed that the grant of the letters of administration to the appellant was defective. They thus intended to file a writ against the appellant to revoke the said letters of administration. They first filed a citation pursuant to O 72 rr 7 and 8 of the Rules of the High Court 1980 ('the RHC'). The appellant applied to set aside and cancel the citation. His application was dismissed by the SAR and his appeal to the judge in chambers was also dismissed. He therefore appealed to the Court of Appeal, contending that the citation should be set aside on the following grounds: (i) the respondents' complaint at the stage of issuing the citation did not disclose any grounds or justification to support their application for cancellation or revocation of the letters of administration; (ii) there was a breach of procedure in that the respondents did not enter caveat before issuing the citation; and (iii) the citation was not applied for by way of summons.

I

Held, dismissing the appeal with costs:

(1) (per **Zulkefli and James Foong JJCA**) The respondents (citors) need not have initiated their application for a citation under O 72 r 7 of the RHC by way of summons in chambers pursuant to r 18 of the same order. Order 72 r 18 of the RHC is applicable only if there are no other provisions in the rules which provide otherwise. However, the procedure for applying for a citation is as provided for under O 72 r 8 of the RHC. Order 72 r 18 of the RHC is only applicable to all applications made after a probate action has been filed and initiated. In any event, the words 'probate cause' in O 72 r 18 of the RHC refer to 'probate action' as defined under O 72 r 1(2) of the RHC — and does not appear to include a simple application for the issue of a citation under r 7 of O 72 of the RHC, which is at the pre-issuance stage of a writ (see paras 19–21).

(2) (per **Zulkefli and James Foong JJCA**) Under O 72 r 7 RHC, an application for a citation may be made ex parte, upon the court being satisfied of the statements of the citors made on affidavit. The right of the citee to be heard would therefore be safeguarded at the time when the writ action is litigated (see para 22).

(3) (per **Zulkefli and James Foong JJCA**) The court need not consider the full merits of an application to revoke a grant when deciding whether to issue a citation under O 72 r 7 of the RHC. The merits would be considered after the writ is filed and heard. What the citors need to do when applying for a citation is to file an affidavit — sworn by the person applying for the citation — verifying the statements of fact to be made in the citation under O 72 r 8(2) of the RHC. In the instant case, the citors (respondents) had done all that. At this stage of the proceedings (issuing of citation) the appellant as citee had already been put to notice of the citors' (respondents') case against him and he was fact placed in a fair position to defend his case when the citors (respondents) filed their writ (see paras 23–25).

(4) (per **Zulkefli and James Foong JJCA**) For the issue of a citation under O 72 r 7, the prior entry of a caveat as applicable under O 71 of the RHC for non-contentious probate proceedings, is not required (see para 26). Since the object of a caveat is to prevent the issue of a grant of representation without notice to the person who has entered it, it is applicable only to a fresh application for the grant of letters of representation; not after such grant. In the instant case, the caveat served no purpose at all since letters of administration had already been granted to the appellant on 2 February 1996 and the citors' (respondents') intended application was to revoke the said grant (see para 31); *Re Tay Tuan Decd* [1962] MLJ 285 referred.

(5) (per **Abdul Aziz Mohamad JCA** (now FCJ)) There is no requirement in the RHC for the entry of a caveat as a precondition for the issue of a citation under O 72 r 7. The requirement of O 71 r 41(3) does not apply in respect of a citation issued under O 72 r 7 (see para 2).

(6) (per **Abdul Aziz Mohamad JCA** (now FCJ)) The Rules themselves do not require the verifying affidavit or the citation to disclose grounds upon which the prospective plaintiff intends to sue for the revocation of the letters of

A administration. Be that as it may, even if an affidavit under r 8(2) was required to disclose the grounds for revocation, the affidavit in this case had done that. The grounds were not frivolous or vexatious (see para 8).

(7) (per **Abdul Aziz Mohamad JCA** (now FCJ)) The respondents' manner of applying for the citation in this case — by a praecipe supported by an affidavit — was proper. An application for a citation under O 72 r 7 is not intended to be heard. Therefore the praecipe and affidavit are not to be served upon the citee. The requirement of O 72 r 18 — that an application to the court in a probate cause or matter is to be made by summons — is intended to apply to the ordinary run of applications that is to be heard, ex parte or otherwise. The requirement is not intended to apply to an application for a citation under O 72 r 7, which application is not meant to be heard. Pursuant to O 72 r 8 all that is required to obtain the issue of a citation, is to swear a verifying affidavit (see paras 9, 13).

[Bahasa Malaysia summary

Perayu adalah seorang pentadbir harta pusaka YHK, si mati. Responden-responden mendakwa bahawa pengeluaran surat kuasa mentadbir kepada perayu adalah cacat. Mereka bercadang untuk memfailkan satu writ terhadap perayu untuk membatalkan surat kuasa mentadbir itu. Mereka pada mulanya memfailkan satu namaan di bawah A 72 k 7 dan 8 Kaedah-Kaedah Mahkamah Tinggi 1980 '(KMT'). Perayu memohon untuk mengetepikan dan membatalkan namaan tersebut. Permohonannya ditolak oleh penolong kanan pendaftar (SAR) dan rayuannya kepada hakim di dalam kamar juga ditolak. Beliau kemudiannya merayu ke Mahkamah Rayuan, mendakwa bahawa namaan tersebut hendaklah dibatalkan atas alasan-alasan berikut: (i) aduan responden-responden pada tahap pengeluaran namaan tidak menyatakan sebarang alasan ataupun justifikasi yang menyokong permohonan mereka untuk pembatalan surat kuasa mentadbir tersebut; (ii) terdapat satu pengingkaran prosedur kerana responden-responden tidak memasukkan kaveat sebelum mengeluarkan namaan tersebut; dan (iii) namaan tersebut tidak dipohon melalui namaan.

Diputuskan, menolak rayuan dengan kos:

(1) (oleh **Zulkefli dan James Foong HHMR**) Responden-responden (yang menama) tidak perlu memulakan permohonan mereka untuk namaan di bawah A 72 k 7 of the KMT 1980 melalui namaan dalam kamar di bawah peruntukan k 18 Aturan tersebut. Aturan 72 k 18 KMT hanya terpakai jika tiada peruntukan lain dibawah peraturan-peraturan tersebut yang menyatakan sebaliknya. Namun begitu, prosedur untuk memohon namaan diperuntukan dibawah A 72 k 8 KMT 1980. Aturan 72 k 18 KMT hanya terpakai kepada kesemua permohonan-permohonan yang dibuat selepas tindakan probet difailkan dan dimulakan. Dalam apa-apa keadaan, perkataan-perkataan 'kausa probet' di dalam A 72 k 18 KMT 1980 merujuk kepada 'kausa probet' sebagaimana yang ditafsirkan dibawah A 72 k 1(2) KMT 1980 — dan tidak

tampak merangkumi permohonan untuk pengeluaran namaan di bawah k 7 A 72 KMT 1980, yang mana merupakan tahap sebelum pengeluaran sesuatu writ (lihat perenggan 19–21).

(2) (oleh **Zulkefli dan James Foong HHMR**) Di bawah A 72 k 7 KMT, sesuatu permohonan untuk namaan boleh dibuat ex parte, selepas mahkamah berpuashati dengan penyataan-penyataan yang menama (citors) ikrarkan di dalam afidavit. Hak yang dinamakan untuk didengar, oleh yang demikian dijaga apabila tindakan writ tersebut dibicarakan.

(3) (oleh **Zulkefli dan James Foong HHMR**) Mahkamah tidak perlu untuk mempertimbangkan merit permohonan untuk membatalkan geran secara menyeluruh apabila memutuskan sama ada namaan boleh dikeluarkan di bawah A 72 k 7 KMT 1980. Merit kes akan hanya dipertimbangkan selepas writ difailkan dan didengar. Apa yang perlu dibuat oleh yang menama apabila memohon satu namaan adalah memfailkan satu afidavit — yang diikrarkan oleh orang yang memohon namaan tersebut — yang mengesahkan penyataan-penyataan fakta yang dibuat di dalam namaan di bawah A 72 k 8(2) KMT. Dalam kes semasa, yang menama (citors) telah membuat kesemua itu. Pada tahap ini dalam prosiding (pengeluaran namaan) perayu sebagai yang dinamakan (cite) telah diberi notis berkenaan kes yang menama (citor) (responden-responden) terhadapnya dan beliau telah diletakkan pada posisi yang adil untuk untuk membela kesnya apabila yang menama (citor) (responden-responden) memfailkan writ mereka (lihat perenggan 23–25).

(4) (oleh **Zulkefli dan James Foong HHMR**) Untuk pengeluaran satu namaan di bawah A 72 k 7, kaveat hendaklah dimasukkan terdahulu sebagaimana yang diperuntukkan di bawah A 71 KMT bagi prosiding probet yang tidak dipertikaikan, ianya tidak diperlukan (lihat perenggan 26). Oleh kerana tujuan kaveat adalah untuk menghalang pengeluaran representasi tanpa notis kepada mereka yang memasukkannya, ianya terpakai hanya kepada permohonan pertama untuk pengeluaran surat-surat representasi; bukanya selepas pengeluaran surat tersebut. Di dalam kes semasa, kaveat tidak mempunyai apa-apa matlamat kerana suratkuasa-suratkuasa mentadbir telah dikeluarkan kepada perayu pada 2 Februari 1996 dan yang menama (responden-responden) berniat untuk membatalkan pengeluaran tersebut (lihat perenggan 31); *Re Tay Tuan Decd* [1962] MLJ 285 dirujuk.

(5) (oleh **Abdul Aziz Mohamad HMR**) Tiada keperluan dibawah KMT untuk kaveat dimasukkan sebagai satu pra syarat kepada pengeluaran namaan di bawah A 72 k 7. Keperluan A 71 k 41(3) tidak terpakai kepada namaan yang dikeluarkan di bawah A 72 k 7 (lihat perenggan 2).

(6) (oleh **Abdul Aziz Mohamad HMR**) Kaedah-kaedah tersebut tidak memerlukan satu afidavit pengesahan atau satu namaan yang menyatakan alasan-alasan yang akan digunapakai oleh seorang plaintif dalam tindakan namaannya untuk membatalkan suratkuasa-suratkuasa mentadbir. Walaupun jika satu afidavit k 8(2) memerlukan alasan-alasan untuk pembatalan dinyatakan, afidavit di dalam kes ini telah memenuhi keperluan itu. Alasan-alasan tersebut tidak remeh dan menyusahkan (lihat perenggan 8).

(7) (oleh **Abdul Aziz Mohamad HMR**) Cara responden membuat permohonan untuk namaan dalam kes ini — dengan praecipe yang disokong oleh afidavit — adalah teratur. Satu permohonan untuk namaan dibawah A 72 k 7 adalah tiak bertujuan untuk didengar. Oleh yang demikian, praecipe dan affidavit tersebut tidak diserahkan keatas yang dinamakan (citee). Keperluan A 72 k 18 — iaitu satu permohonan ke mahkamah dalam kausa atau perkara probet hendaklah dibuat melalui namaan — adalah bertujuan untuk digunapakai pada permohonan lazim yang perlu didengar, ex parte atau sebaliknya. Keperluan tersebut tidak bertujuan untuk digunapakai kepada satu permohonan untuk namaan dibawah A 72 k 7, yang mana permohonan tersebut tidak perlu didengar. Di bawah A 72 k 8 apa yang diperlukan untuk mendapat pengeluaran satu namaan adalah satu pengingkaran afidavit pengesahan (lihat perenggan 9, 13).]

Notes

For cases on letters of administration, see 2 *Mallal's Digest* (4th Ed) Consolidated Subject Index paras 196–197.

For cases on revocation of grant, see 11 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 2332–2338.

Cases referred to

Tay Tuan Decd, Re [1962] MLJ 285 (refd)

Legislation referred to

Rules of the High Court 1980 O 32 r 1, O 70 r 4(3), O 71 rr 1(2), 37(1), (3), 41(3), O 72 rr 1(2), 2(1), (3), 7, 8(2), (3), 15(3), 18

Rules of the Supreme Court 1965 [UK] O 76 r 4

Appeal from: Petition No 31–38 of 1995 (High Court, Temerloh)

Maniam Kuppusamy (Skrine) for the appellant.
Francis Tan (Rosni, Francis Tan & Ho) for the respondent.

Abdul Aziz Mohamad JCA (now FCJ):

[1] This appeal, which we unaminously dismissed, questioned the validity of a citation issued on 29 November 2000 under O 72 r 7 of the Rules of the High Court 1980 ('the RHC'). The state of affairs and the events that necessitated and led up to the issue of the citation are set out in the grounds of judgment of my learned brother, Zulkefli JCA, with which my learned brother, James Foong JCA, associates himself.

THE NEED TO ENTER A CAVEAT

[2] Although the question about the need to enter a caveat was raised in the appellant's skeletal submission, it was raised merely as a point of appeal, that is, it was not argued, and in his oral submission in the appeal the appellant's counsel did not submit on the question, except to answer a question on the subject from my learned

brother James Foong JCA at the close of the submissions. I therefore believed that the appellant was no longer pursuing the question and that it did not need to be decided. But since Zulkefli JCA has dealt with the question, I will simply say that I, too, am of opinion, and for the reasons given by my learned brother, that there is no requirement in the RHC for the entry of a caveat as a precondition for the issue of a citation under O 72 r 7 and that the requirement of O 71 r 41(3) does not apply in respect of a citation issued under O 72 r 7.

[3] Only two questions were submitted on by the appellant's counsel in the appeal.

GROUNDS FOR REVOCATION OF THE APPELLANT'S LETTERS OF ADMINISTRATION

[4] The appellant's counsel submitted that the respondents had not disclosed valid grounds for the revocation of the grant to the appellant of the letters of administration that they intended to seek by their intended writ and that the grounds disclosed in the citation were not valid grounds. The appellant's counsel relied on the following passage at p 472 of *Tristram and Coote's Probate Practice* (19th Ed):

> An action for the revocation of letters of administration is instituted: (1) On the allegation that they were granted to a person without sufficient title to the grant. The object of such a suit is to compel the party who has obtained the grant of administration to establish such a degree of relationship with the deceased as will entitle him to the grant, and in the result it becomes an interest suit. (2) On the discovery of a will, the validity of which is not admitted by the grantee. This may necessitate an action for the revocation of the grant and for a pronouncement in favour of the will.

[5] The letters of administration granted to the appellant were for the estate of his father, YHK. In his petition dated 10 October 1995 for the grant of administration, the appellant listed two properties as comprising the estate of YHK, which for convenience I shall refer to simply as Lot 430 and Lot 432. The title to Lot 430 was subsequently cancelled on 4 August 1998 pursuant to an order of court dated 30 January 1996, having reverted to the State, and Lot 432 belonged to the estate of YSK, the father of YHK, who was the administrator of the estate of YSK and who died before completing the administration of that estate. Although Lot 432 was registered in the name of YHK, the registration was as a representative, that is, of the estate of YSK.

[6] In their affidavit in support of their application for the issue of the citation, the respondents, who are the children of YSK, gave, as reasons for the revocation of the grant of administration to the appellant that they would be seeking by writ, the petitioner's failure to state the true position as regards Lots 430 and 432 and the fact that YHK was a bankrupt.

[7] Although Lot 430 reverted to the State only after the appellant petitioned for the grant of administration, there was nevertheless a question to be answered whether the grant ought not now to be revoked seeing that the two properties that YHK's estate were said to comprise were not now the property of YHK's estate, with Lot 432

moreover belonging to YSK's estate, and, along with that question, whether the passage from *Tristram and Coote' Probate Practice* relied on by the appellant's counsel is exhaustive of the circumstances that would justify the revocation of a grant of letters of administration. Those would be questions to be decided in the proposed writ action and not at the stage of the issue of the citation or in the appeal.

[8] The requirement for the issue of a citation under O 72 r 7 is laid down in O 72 r 2(3), which provides that a writ beginning an action for the revocation of the grant of letters of administration shall not be issued unless a citation under r 7 has been issued. Order 72 r 8(2) provides that before the citation is issued an affidavit verifying the statements of fact to be made in the citation must be sworn by the person applying for it to be issued. What the statements of fact are that are to be made in a citation and that are to be verified by the affidavit are not indicated in the RHC and neither do the RHC provide the form of a citation under r 7, but according to r 7 what a citation does is to require the grantee of the letters of administration to bring them into and leave them at the Registry. Certainly the RHC themselves do not lay down the requirement that the verifying affidavit or the citation should disclose grounds on which the prospective plaintiff intends to sue for the revocation of the letters of administration. The learned judge was satisfied that the affidavit in this case 'contain [sic] all the relevant and material facts that need [sic] to support an application for a citation at this stage'. I was of the view that even if an affidavit under r 8(2) has to disclose the grounds for revocation, the affidavit in this case had done that. The grounds were not frivolous or vexatious.

MANNER OF APPLYING FOR THE ISSUE OF A CITATION

[9] Order 72 r 7 says that a citation 'may be issued on the application of the plaintiff'. Order 72 does not specifically provide for the manner of applying for the issue of a citation under r 7, except that r 8(2), as stated before, requires a verifying affidavit to be sworn before the citation is issued, but r 18 provides: 'Except where these rules otherwise provide, any application to the court in a probate cause or matter may be made by summons'.

[10] The respondents applied for the citation in this case not by a summons but by a praecipe for a citation to which was appended the required verifying affidavit. The praecipe was filed as an application in the appellant's petition for the grant of administration to YHK's estate. The citation that was issued began with words in Malay that in English would be 'Whereas it appears by an affidavit of [the respondents]'. The appellant's counsel argued that the respondents should have applied by summons which should have been served on the appellant because he contended, although unable to cite any authority in support, that the parties must be heard on an application for a citation. The forms of the praecipe that was used in this case and of a citation under O 72 r 7 are not provided in the RHC.

[11] The RHC do, however, provide several forms of citation as Form 176, but they are for purposes falling under O 71. These forms are mentioned in O 71 r 41, which requires every averment in a citation to be verified by an affidavit. Neither in rule 41 or any other rule of O 71 is there any mention of an application for a citation

or the manner of applying for one, but every one of those forms of citation begins with the words, 'Whereas it appears by an [or the] affidavit of …'. In none of the forms of citation is there any mention of any application or a summons, or any indication that they are to be issued after a hearing. It would appear, therefore, that citations issued under O 71 r 41 are not applied for by a summons and are issued simply on the strength of the verifying affidavit, without a hearing.

[12] The use of praecipes as an application is not alien to the RHC. To take an example, O 70 r 4(3) provides for the manner of applying for the issue of a warrant to arrest property in admiralty proceedings. It says: 'A warrant of arrest shall not be issued until the party applying for it has filed a praecipe in Form 157 requesting issue of the warrant together with an affidavit …'.

[13] Considering the position as regards citations under O 71 r 41, and that application by praecipe is provided for by the RHC in respect of other matters, I was of the view that the manner of applying for the citation in this case, that is, by a praecipe backed by an affidavit, was proper. I was also of the view that an application for a citation under O 72 r 7 is not intended to be heard and therefore the praecipe and affidavit are not for service on the citee. I was of the further view that the requirement of O 72 r 18 that an application to the court in a probate cause or matter be made by summons is intended to apply to the ordinary run of applications that is to be heard, ex parte or otherwise, and is not intended to apply to an application for a citation under O 72 r 7, which is not meant to be heard. In addition, it would appear from O 72 r 8 that all that is needed to be done to obtain the issue of a citation is to swear a verifying affidavit. The learned judicial commissioner was therefore right in saying that that was the procedure provided by r 8 for the issue of a citation and that therefore the application of r 18 is by its own terms excepted.

[14] The requirement of O 72 r 2(3) of the issue of a citation for the surrender of letters of administration before a writ for their revocation can be issued followed the requirement that once existed in the English Rules of the Supreme Court 1965 ('the English Rules'). If the citee were to have a say in the matter of the issue of the citation, so that he could insist that the application for it be served on him and be heard with his participation, so it could be opposed by him on procedural or other grounds, it would mean that the procedure for the issue of a citation could be used to frustrate the intended action for the revocation of the grant of the letters of administration, whereas the purpose of the citation is simply to have the letters of administration out of his hands pending their revocation should the citor succeed in the intended writ action. It cannot be that the stage of the application for the citation is intended as a kind of sieve to determine in advance actions for revocation that would fail and to prevent their filing. The present position under the English Rules (O 76 r 4) is that the issue of a citation is no longer a condition for the issue of a writ. The writ is issued as usual, and the defendant who has in his possession the letters of administration has to lodge them in court within 14 days after the service of the writ on him. If he fails to do so any party to the action may apply for an order of lodgement, and he will not be allowed to take any step in the action until he has complied with the order. I should like to believe that the present position came about because it was seen that the previous position was an unnecessary imposition on a

person who wished to have the grant of letters of administration revoked, unnecessary because the imposition gave no benefit whatsoever to the person in possession of the letters of administration as he could not have a say in the issue of a citation.

Zulkefli JCA:

INTRODUCTION

[15] This is an appeal by the appellant against the decision of the learned judicial commissioner of the High Court at Temerloh who on an appeal by the appellant to the judge in chambers against the decision of the learned senior assistant registrar ('SAR') affirmed the decision of the SAR in dismissing the appellant's application to set-aside and to cancel the citation ('the said citation') dated 29 November 2000 issued pursuant to O 72 rr 7 and 8 of the RHC. For easy reference, the provisions of O 72 rr 7 and 8 of the RHC are reproduced in full as follows:

> 7 Citation to bring in grant (O 72 r 7)
>
> In an action for the revocation of the grant of probate of the will, or letters of administration of the estate of a deceased person, a citation against the person to whom the probate or letters of administration, as the case may be, was or were granted requiring him to bring into and leave at the Registry the probate or letters of administration, as the case may be, may be issued on the application of the plaintiff.
>
> 8 Citations (O 72 r 8
>
> (1) A citation under rule 5 or 7 must be issued out of the Registry and must be settled by the Court before it is issued.
>
> (2) Before such a citation is issued an affidavit verifying the statements of fact to be made in the citation must be sworn by the person applying for it to be issued:
>
> Provided that the Court may in special circumstances allow the affidavit to be sworn by that person's solicitor.
>
> (3) Issue of a citation takes place upon its being sealed by an officer of the Registry.
>
> (4) Without prejudice to Order 62 rule 5, a citation under rule 5 or 7 must be served personally on the person cited.
>
> (5) Service out of the jurisdiction of a citation under rule 5 or 7 is permissible but, in the case of a citation under rule 7, only with the leave of the Court.
>
> (6) Order 11 rule 4, shall apply in relation to an application for the grant of leave under paragraph (5) as they apply in relation to an application for the grant of leave under rule 1 or 2 of that Order.
>
> (7) An order granting leave to serve a citation under rule 7 out of the jurisdiction must limit a time within which the person to be served with the citation must comply with it.
>
> (8) Order 11 rules 5, 6 and 8 shall apply in relation to a citation under rule 7 as they apply in relation to notice of a writ.

[16] For the purpose of this appeal, the appellant, who at the material times, was the administrator of the estate of his late father, one Yap Hong Kai (deceased), is the

citee while the respondents who at the material times were the brothers and sisters of the said Yap Hong Kai (deceased), are the citors. A

FACTS OF THE CASE

[17] The relevant facts of the case giving rise to the appellant's action herein and the chronology of events may be summarized as follows: B

(1) One Yap Swee King @ Yap Swee Kim @ Yap Swee Keng ('YSK') died on 2 October 1964. The appellant's late father, one Yap Hong Kai (deceased) ('YHK') and all the citors are children of the said YSK. At the time of YSK's death, the beneficiaries were his wife (one Tan Sok Hun) and YHK and the citors. On 21 May 1968, the said YHK was granted a letter of administration to administer the estate of the said YSK. However, on 1 November 1993, before the administration of YSK's estate is completed YHK died. C

(2) On 2 February 1996, the appellant was granted a letter of administration to administer the estate of the said YHK. The list of assets or properties of the estate of YHK as exhibited in the letter of administration are: land held under GM 706 Lot 430, Sek 9, Sungai Ara, Mukim Mentakab, Pahang, and land held under GM 210 Lot 432, Sek 9, Sungai Ara, Mukim Mentakab, Pahang. D

(3) The citors claimed that one of the assets listed in the estate of YHK namely land held under GM 210 Lot 432, Sek 9, Sungai Ara, Mukim Mentakab, Pahang belongs to the estate of YSK. This is evidenced by the fact that the document and title for this property had YHK registered as 'representative'. As regards to the other property listed in the estate of YHK is GM 706 Lot 430, Sek 9, Sungai Ara, Mukim Mentakab, Pahang which according to the citors belong to the State Government of Pahang as declared by the High Court in Temerloh on 30 January 1996. E F

(4) Fearing that the appellant may distribute these two properties to the beneficiaries of the estate of YHK, the citors claimed that the said grant of the letter of administration to the appellant was defective. Aside from the reasons stated above, the citors added that the appellant has failed to inform the court that his late father, YHK was an undischarged bankrupt at the time of his death. An adjudicating order and receiving order to that effect was made against YHK on 30 April 1979. G

(5) In the meantime the first citor has applied for a letter of administration *de bonis non* for the unadministered estate of YSK vide Mahkamah Tinggi Temerloh, Petition No 31–26 of 1999 involving land held under GM210 Lot 432, Sek 9, Sungai Ara, Mukim Mentakab, Pahang. H

(6) The citors have disclosed that they intend to file a writ against the appellant to cancel or revoke the said grant of letter of administration of the estate of YHK. I

(7) For this purpose and as a condition precedent before the said writ can be issued, the citors on 31 October 2000 applied for the issuance of a citation under O 72 rr 7 and 8 of the RHC in the estate of YHK. This was granted by the High Court in Temerloh on 29 November 2000 which directed the

appellant to bring into and leave at Registry of the said High Court the letter of administration for the estate of YHK.

(8) On 15 December 2000, the appellant filed a summons in chambers to set aside or to cancel this citation.

THE APPELLANT'S CONTENTION

[18] On appeal before us and in the court below, it is the contention of the appellant that the said citation should be set aside on three main grounds:

(1) The citors' complaint at the stage of issuing the citation did not disclose any grounds or justification to support their application for cancellation or revocation of the said grant of the letter of administration for the estate of YHK.

(2) The said citation was applied for and issued not in accordance with the procedure under the RHC, in that the citors have not entered any caveat before issuing the citation.

(3) The said citation was not applied for by way of summons.

WHETHER APPLICATION FOR CITATION MUST BE APPLIED BY WAY OF SUMMONS

[19] Firstly, we would like to deal with the issue as to whether in an application for the issuance of a citation as in the present case it must be made by summons as contended by the appellant. Learned counsel for the appellant argued that a citation may be issued under O 72 r 7 of the RHC on application of the citors. There must be a form of application. He further argued that under r 18 of the same O 72, except where these rules otherwise provide, any application to the court in a probate cause or matter may be made by summons. He also argued that under O 32 r 1 of the RHC, every application in chambers must be made by summons in Form 62. Therefore, learned counsel for the appellant concluded that the citors should have initiated their application for a citation under O 72 r 7 of the RHC by way of summons in Form 62. He contended that since the citors have failed to do so the citation is a nullity, and that which cannot be cured. Learned counsel for the citors, on the other hand, argued that O 72 r 18 of the RHC is only applicable after a writ to revoke the grant has been filed in court. In the present case, since the writ has yet to be filed, application for the citation need not be by way of summons.

[20] It is our view that the citors need not initiate their application for a citation under O 72 r 7 of the RHC by summons as provided under r 18 of the same order. It is to be noted that the said O 72 r 18 of the RHC is applicable only if there is no other provisions in the rules which provide otherwise. The procedures for applying for a citation is provided for under O 72 r 8 of the RHC. Rule 8(2) of the said O 72 of the RHC provides that before such a citation is issued an affidavit verifying the statement of fact to be made in the citation must be sworn by the person applying for it to be issued: Provided that the court may in special circumstances allow the affidavit to be sworn by that person's solicitor. A reference to Forms 176(a)–(g) of the

RHC would show that the citations are issued pursuant to the filing of the relevant affidavits and not after a trial or a hearing which would be proceeded by either a writ or summon. It is also to be noted that there is no mention that the application under O 72 r 7 of the RHC must be made by summons, as compared to what has been provided for in an application for discontinuance of a probate action under r 15(3) of the same O 72 of the RHC wherein it specifically provides that it may be made by summons.

[21] We are in agreement with the view taken by the learned judicial commissioner that the requirement under O 72 r 18 of RHC is not mandatory. The said r 18 of O 72 of the RHC uses the word 'may' instead of 'shall' or 'must'. If it is meant to be mandatory, the word 'shall' or 'must' should have been used instead. It is our view that the argument put forth by the citors that O 72 r 18 of the RHC is only applicable to all applications made after probate action has been filed and initiated is tenable in the circumstances of this case. The said r 18 of O 72 of the RHC refers to any application to the court in a "probate cause or matter'. 'Probate cause' must be referring to 'probate action' as defined under O 72 r 1(2) of the RHC which means an action for the grant of probate or letters of administration of the estate of a deceased person or for revocation of such grant or for a decree pronouncing for or against the validity of an alleged will. That being the case, it would appear that it does not include a simple application for the issue of a citation under r 7 of the same O 72 of the RHC which is at the stage of the pre-issuance of a writ.

[22] The appellant has also complained that he has been deprived of an opportunity to be heard as the citors' application for the citation was made ex parte. But under O 72 r 7 of the RHC application of such a nature can be made and the court upon being satisfied of the statements of the citors made on affidavit would issue the citation. The right of the citee to be heard would therefore be safeguarded at the time when the writ action is litigated.

WHETHER THE CITORS NEED TO DISCLOSE GROUNDS OR JUSTIFICATION TO SUPPORT THEIR APPLICATION FOR REVOCATION OF THE GRANT OF LETTER OF ADMINISTRATION AT THE STAGE OF ISSUING A CITATION

[23] Secondly, we shall deal with the issue of whether the citors need to disclose grounds or justification to support their application for revocation of the grant of the letter of administration of the estate of YHK at this stage of the proceedings, ie at the stage of issuing a citation. This issue relates more to the merit of the application by the citors to revoke the said grant and this can be considered when the writ is heard. Before this writ can be issued, a citation under O 72 r 7 of the RHC must first be issued. The present case before this court is in respect of the application for issuing of a citation. Therefore, we are of the view that the court need not consider the full merits of the application to revoke the said grant at this stage; it will be duly taken up after the writ is filed and heard.

[24] What the citors need to do at this stage of the proceeding is to file an affidavit sworn by the person applying for a citation to be issued verifying the statements of fact to be made in the citation under O 72 r 8(2) of the RHC. To this effect the citors have sworn an affidavit dated 31 October 2000 to support their applications, and it basically said:

(i) the said land held under GM 210 Lot 432, Sek 9, Sungai Ara, Mukim Mentakab, Pahang, was and is still a property belong to the estate of YSK, not the estate of YHK;

(ii) the said land held under GM 706 Lot 430, Sek 9, Sungai Ara, Mukim Mentakab, Pahang was and is still belong to the State Government, not the estate of YHK;

(iii) the said YHK, at the time of his death, was an undischarged bankrupt;

(iv) that the first citor has applied for a letter of administration *de bonis non* in respect of the unadministered estate of the said YSK vide Mahkamah Tinggi Temerloh, Petition No 31–26 of 1999;

(v) that citors intend to file a writ against the appellant to revoke the said grant of a letter of administration earlier granted to him on 2 February 1996; and

(vi) the citation is to direct the appellant to bring into and leave at the Registry the letter of administration earlier granted to the appellant.

(see pp 140–148 of the appeal record)

[25] We are of the view the learned judicial commissioner in his judgment had rightly stated that he had scrutinized the contents of the citors' affidavit and was satisfied that they contained all the relevant and material facts that need to support an application for a citation. It is not appropriate for the court to consider the full details on why the citors desire to set aside the letter of administration. In our judgment, it can be said that at this stage of the proceedings the appellant as citee had already been put to notice of the citors' case against the citee and the citee is in fact placed in a fair position to defend his case when the writ is filed by the citors.

WHETHER A CAVEAT NEED TO BE ENTERED BEFORE A CITATION IS ISSUED

[26] Thirdly, on the issue of whether a caveat need to be entered before a citation is issued, the relevant rules and laws relating to this need to be considered. The relevant rules relating to the matter are found in the RHC, particularly O 71 and O 72. The learned judicial commissioner was of the view that for a citation under O 72 r 7 of the RHC to be issued the prior entry of a caveat as applicable under O 71 of the RHC for non-contentious probate proceeding is not required; it is not a pre-condition to issue a citation under O 72 r 7 of the RHC.

[27] Order 71 of the RHC provides for procedures relating to non-contentious probate proceeding, while O 72 of the RHC provides for procedures relating to contentious probate proceeding. For the purpose of the RHC, 'probate proceedings'

include a proceedings in probate (where will is involved) as well as proceedings for letters of administration (where no will is involved). A

[28] Order 1 r 4(1) of the RHC provides 'probate action' has the meaning assigned to it by O 72. Order 72 r 1(2) provides: B

> (2) In these rules 'probate action' means an action for the grant of probate of the will, or letters of administration of the estate, of a deceased person or for the revocation of such a grant or for a decree pronouncing for or against the validity of an alleged will, not being an action which is non-contentious.

C

[29] For citations in non-contentious probate matters under O 71 of the RHC the citor must enter a caveat before the issue of the citations. Order 71 r 41(3) of the RHC clearly provides for this requirement (see also *Tristram and Coote's Probate Practice* (23rd Ed) at p 540). Thus in that circumstances, a citation cannot be issued unless and until the citor has entered a caveat. However, it must be stressed that this D requirement under O 71 r 41(3) of the RHC is only for non-contentious probate proceedings under O 71. The provisions relating to caveat are to be found under O 71 r 37 of the RHC. Order 71 r 37(1) and (3) provides that 'any person who wishes to ensure that no grant is made without notice to himself may enter a caveat' by filing the Caveat Form 173 in the Registry. It is a notice in writing (Form 173) lodged at the Registry of the High Court. The object of a caveat is to prevent the issue E of grant of representation without notice to the person by whom or on whose behalf the caveat is entered.

[30] For the present case, it involves the citors' intended application by writ to F revoke the grant of the letter of administration of the estate of YHK. By virtue of the definition of the words 'probate action' under O 72 r 1(2) of the RHC that proceeding is a probate action. It is a contentious probate proceeding as defined thereunder. Therefore, for the purpose of the present proceedings, the applicable rules are Order 72, not O 71 of the RHC. A probate action under O 72 r 2(1) of G the RHC must begin by writ and the writ must be issued out of the Registry. The citors' application for citation clearly indicates that the application was made under O 72 rr 7 and 8 of the RHC (see p 45 of the appeal record).

[31] Order 72 r 8(3) of the RHC further provides that 'issue of a citation takes place upon its being sealed by an officer of the Registry.' Unlike O 71 of RHC, there H is nothing under O 72 of the RHC which mention that a caveat must first be entered before a citation can be issued. Therefore we are of the view that for a citation under O 72, particularly r 7 thereof, the prior entry of a caveat as applicable under O 71 of the RHC for non-contentious probate proceedings is not required. It is not a pre-condition to the issue of a citation under O 72 r 7 of the RHC. It is only logical I that since the object of a caveat is to prevent the issue of a grant of representation without notice to the person who has entered it, it is applicable only in fresh application for the grant of the representation; not after the grant. The caveat served no purpose at all in the present case where a letter of administration has already been granted to the appellant on 2 February 1996 and the citors' intended application is

to revoke the said grant. In MLJ Handbook Series, *Administration of Estates Handbook* — Advisory Editor Kanesh Sundrum (at p 1[202]) it is stated that:

> Once representation has been granted to any petitioner and extracted, a caveat cannot be entered to stop any proceeding relating to the estate. In such a situation, the proceedings can only be stopped by revoking the grant of representation.

[32] It is clearly not the intention of the Rules Committee to impose on the requirement that a caveat must first be entered before a citation is issued under O 72 r 7 of the RHC. Otherwise, a similar provision as that of O 71 r 41(3) of the RHC, for a caveat to be entered before issuing a citation, must have been included some where in O 72 of the RHC.

[33] The appellant's counsel cited the case of *Re Tay Tuan Decd* [1962] MLJ 285 to support his argument that a caveat need to be entered before issuing a citation in the present case. *Re Tay Tuan Decd* was decided by Adams J in Muar High Court on 20 June 1962. In that case, Adams J held (in delivering oral judgment), inter alia, as follows:

> The preliminary steps to be taken by a party who desires to obtain the revocation of a grant of letters of administration are: (1) enter a caveat; (2) follow it with an extraction of a citation to the administrator to bring the grant to the Registry. This should be followed by the issue of an originating motion.

[34] On the appellant's contention that a caveat need to be entered before the issuance of a citation and their reliance on the above cited case we wholly agree with the views expressed by the learned judicial commissioner wherein he had comprehensively dealt with this point in his judgment as follows:

> In that case, a petition for a letter of administration was filed in 1951 vide Petition for LA No 98 of 1951. A letter of administration was granted in 1952. The decision of the court in dismissing the motion to revoke the grant was made on 20 June 1962. At that material times when the decision was made, the relevant rules relating to the matter were found in the Probate and Administration Rules 1961 (particularly rules 38 and 39) which came into effect on 15 February 1962. The said rules were repealed by PU(A) 50/80 and substituted by the Rules of the High Court 1980 since 1980 until today. The issue in question is purely a procedural matter, not substantive matter. Therefore the procedural laws and rules applicable in a particular case depends on the existing laws and rules applicable at the particular time when the case comes up. Rule 38(3) of the Probate and Administration Rules 1961 clearly indicates that "the citor shall enter a caveat before issuing a citation". This requirement is in pari materia with O 71 r 41(3) of the present RHC (in relation to non-contentious probate proceedings). However, there is no corresponding separate provisions for non-contentious and contentious probate proceedings on the 1961 Rules as what we have in the present O 71 and O 72 of the RHC. In the present RHC procedures for non-contentious and contentious probate proceedings are separated and differentiated — for non-contentious proceedings the procedures are under O 71 while for contentious proceedings the procedures are under O 72. Under O 72 of the present RHC, there is no mention about caveat and thus no requirement that caveat must first be entered before a citation can be issued. That provisions and requirement are only to be found in O 71, but not O 72. Therefore, I am of the view that the decision of Adams J in *Re Tay Tuan Decd*

may not be applicable to the present case on the ground that, that case was dealing with a totally different set of applicable laws (at that time) compared to the present O 72 of the RHC.

CONCLUSION

[35] Having perused the grounds of judgment of the learned judicial commissioner, we are of the considered view that the learned judicial commissioner, after having considered all the relevant facts and the applicable law, had arrived at a correct decision. Accordingly, we would dismiss this appeal with costs and order that the deposit be paid to the respondents on account of taxed costs.

[36] My learned brother, James Foong JCA has seen this judgment in draft and has expressed his agreement with it.

Appeal dismissed with costs.

Reported by John Paul Simon